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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Request for Extension of the Sunset Date of the  
Structural, Non-Discrimination, and Other  
Behavioral Safeguards Governing Bell Operating  
Company Provision of In-Region, Inter-LATA  
Information Services

CC Docket No. 96-149

**REPLY COMMENTS OF PSINET INC.**

PSINet Inc. ("PSINet") submits these Reply Comments in support of the above-captioned request of the Commercial Internet eXchange Association ("CIX") and the Information Technology Association of America ("ITAA").<sup>1</sup> In their Petition, CIX and ITAA request that the Federal Communications Commission ("Commission") extend for two years the sunset date of the structural, non-discrimination and other pro-competitive behavioral safeguards governing Bell Operating Company ("BOC") provisioning of in-region, interLATA information services set forth in Sections 272(b), (c), (d), and (g) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§272(b), (c), (d), (g). As discussed below, PSINet strongly supports the Petition and urges the Commission to exercise its statutory authority to issue an order extending

<sup>1</sup>

Request of the Commercial Internet eXchange Association and the Information Technology Association of America, CC Docket 96-149 (filed November 29, 1999).

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the sunset date of the structural, non-discrimination and other Section 272 pro-competitive safeguards for at least two years.<sup>2</sup>

### **STATEMENT OF INTEREST**

PSINet was the first commercial Internet service company, and continues to be a leading provider of Internet services and Internet access in the United States and abroad. PSINet is the leading independent Internet backbone provider in the U.S., as it is not controlled by any other telecommunications carrier.<sup>3</sup> PSINet's network currently provides direct Internet access in more than 800 metropolitan areas in 22 countries on five continents.

PSINet engineers and executives have developed many of the most significant technical and product innovations in the Internet's history, and are at the forefront of Internet backbone investment and development. PSINet has a major stake in the deployment of high-quality, high-speed broadband telecommunications capability through all levels of the network. As the BOCs are permitted to enter the interLATA information services market, structural separation will prevent them from abusing their continued monopoly control over the local exchange market in a manner that could disrupt the development of a competitive broadband Internet services market.

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<sup>2</sup> Congress recognized that continued BOC anti-competitive and monopolistic behavior in the local exchange market would warrant an extension of the sunset date and thus granted the Commission the authority to extend the sunset date if deemed necessary. *See* 47 U.S.C.A. § 272(f). If the Commission does not extend the sunset date it will expire on February 8, 2000.

<sup>3</sup> Ten percent of the world's Internet traffic is carried across PSINet's network.

## DISCUSSION

### **I. CONGRESS CLEARLY INTENDED THE SECTION 272 SAFEGUARDS TO APPLY TO THE BOCs FOR A PERIOD OF TIME AFTER BEING GRANTED SECTION 271 APPROVAL**

The CIX/ITAA Petition articulates the most logical explanation of Congress' intent for BOC entry into the interLATA services markets. Congress was clearly concerned that the BOCs would leverage their local exchange monopoly in a way that would undercut competition in the interLATA information services market.<sup>4</sup> In order to limit the potential for BOC abuse of their local exchange monopoly, Congress enacted laws which require the BOCs to provide interLATA services through a structurally separate affiliate, subject to expiration four years after passage of the Act.<sup>5</sup> Further, Congress expressly authorized the Commission to extend the sunset date, without limitation. Congress recognized that market conditions may necessitate the extension of the sunset. Congress understood that the Commission would be in the best position to determine whether extension of the structural separation requirement was necessary.

Indeed, nearly four years after the passage of the Act, real competition in the provision of local exchange services is negligible. Only last week did the first BOC, Bell Atlantic, obtain Section 271 approval. Certainly, Congress did not contemplate that the BOCs would have made such little progress thus far in opening the local exchange markets to competition. Allowing the

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<sup>4</sup>

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), ¶9, 11 FCC Rcd. 21905 (1996). ("In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening. Congress, therefore, imposed in section 272 a series of separate affiliate requirements applicable to the BOC's provision of certain new services and their engagement in certain new activities. . . designed, in the absence of full competition in the local exchange marketplace, to prohibit anti-competitive discrimination and cost-shifting, while still giving consumers the benefit of competition.")

BOCs to enter the interLATA information services market without ever having transitioned through the separate affiliate framework would in effect thwart Congress's pro-competitive objectives. To avoid this result, the Commission should exercise its authority, and arguably its duty, to extend the sunset for the separate affiliate requirement contained in Section 272(f).

## **II. EXTENDING THE SUNSET REQUIRING THE BOCS TO PROVIDE INTER-LATA INFORMATION SERVICES THROUGH A STRUCTURALLY SEPARATE AFFILIATE IS NECESSARY TO PREVENT THE BOCS FROM ABUSING THEIR LOCAL MARKET POWER**

The BOCs have acted anti-competitively toward Internet service providers and competitive local exchange carriers.<sup>6</sup> PSINet is one of the BOCs' largest customers. Nonetheless, PSINet experiences significant anti-competitive behavior in the provisioning of services by the BOCs. Because the BOCs have monopoly control over the local network, PSINet has limited alternative sources to obtain the necessary inputs to provide its services. Like other providers that are forced to rely in part on BOC facilities to provide their services, PSINet experiences significant delays in having local loops provisioned and in obtaining timely information necessary for planning its offerings. Additionally, PSINet is subject to BOC services that are costly and often unreliable.

The poor provisioning of services by the BOCs hinders the rapid deployment of broadband Internet services. Indeed, the BOCs' incentive to abuse their local market power will only increase once they are allowed enter the interLATA information services market, as the

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*(footnote continued from previous page)*

<sup>5</sup> 47 U.S.C. § 272(f).

<sup>6</sup> See Comments of Prism Communications Services, Inc.

BOCS will be directly competing with PSINet and other backbone Internet providers. Such abuses will undercut competition, thus denying consumers the benefits associated with a fully competitive market.

The ability of the BOCs to act anti-competitively is measured by their continued market power in the local markets. The BOCs, however, unconvincingly argue that they could not extend their market power because of existing competition in the interLATA information services market. If competition in the interLATA services markets was the gauge to measure the potential for monopoly abuse, no requirement for a structurally-separate affiliate would have been included in the Act. Indeed, reasonable competition in the interLATA telecommunications market existed at the time of the passage of the Act. Instead, the correct indicator of potential abuse in the interLATA information services market is competition in the local exchange market. Measuring the market which the monopolist controls, not the market which the monopolist seeks to enter, is central to basic concepts of antitrust law.

Even if, as the BOCs would like the Commission to believe, the appropriate market to measure was the interLATA information services market, the BOCs have attempted to confuse the Commission by arguing that the Internet content and market capitalization of leading web site companies would somehow shield such companies from BOC anti-competitive tactics with respect to the provision of essential local exchange facilities and services. Both BellSouth and US West argue that the sunset need not be extended because the BOCs lack market power with respect to content on web pages.<sup>7</sup> Their arguments are merely a ploy to avoid addressing the fact

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<sup>7</sup>

Comments of BellSouth Corporation, p. 8., Comments of SBC Communications Inc., p.5.

that BOCs will be able to adversely affect the interLATA information services market due to their monopolistic control over the local exchange market.

Allowing the BOCs to enter the interLATA information services at this time, without appropriate structural separation requirements, will threaten the development of a competitive broadband Internet market. The widespread deployment of competitive broadband services is a major imperative of Congress and the Commission.<sup>8</sup> Ensuring the development of a competitive broadband services market far outweighs the feeble consumer service offerings described by the BOCs should the structural separation rule be allowed to sunset. For example, US West indicates that it would offer such “innovative” products and services as yellow page searches and concierge services. There is absolutely nothing novel about these services and one wonders why these services cannot be provided through a separate affiliate.

### **III. STRUCTURAL SEPARATION PROVIDES GREATER SAFEGUARDS AGAINST ANTI-COMPETITIVE BEHAVIOR**

Structural separation provides greater safeguards against anti-competitive abuse than the *Computer III* safeguards. Congress clearly recognized that strong safeguards would be needed to protect against BOC abuses in the interLATA information services market. In passing the Act, Congress could have simply chosen to adopt the *Computer III* framework for interLATA information services. Instead Congress elected to enact the stronger structurally separate affiliate

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*See* U.S.C. § 706 (“The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .”); *See also* [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1999/nrmc9083.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9083.html) (FCC special report on the importance of broadband and its potential impact on America.)

requirements. Extension of the Section 272 structural separation requirement is a key element in ensuring that the nascent broadband Internet market is competitive.

The competitive benefits of a structurally separate affiliate continue to be extolled. Just last week, Bell Atlantic recognized the value of the separate affiliate in providing non-discriminatory access to services and facilities.<sup>9</sup> In fact, Chairman Kennard stated that he would not have voted in favor of Bell Atlantic's New York Section 271 Application if Bell Atlantic had not agreed to form a separate subsidiary to provide DSL service.<sup>10</sup>

**IV. THE COMMISSION SHOULD INITIATE A FULL INQUIRY TO ASSESS WHETHER COMPETITIVE SAFEGUARDS ARE NEEDED TO ENSURE A COMPETITIVE INTERLATA INFORMATION SERVICES MARKET**

PSINet supports petitioners' request for the Commission to initiate an inquiry to assess both the level of competition that exists in the local markets and determine whether such safeguards are necessary in the interLATA information services area. A full inquiry will provide the support necessary to evaluate the state of local competition and its effects on the interLATA information services market. Such an inquiry should be conducted prior to the lifting of the sunset.

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<sup>9</sup> Ex Parte Letter Filed in Connection with Bell Atlantic's Section 271 Application for New York. (filed December 10, 1999).

<sup>10</sup> "FCC Approves Bell Atlantic Long Distance Entry in N.Y.," Communications Daily, Thursday December 23, 1999, Vol. 19, No. 246.

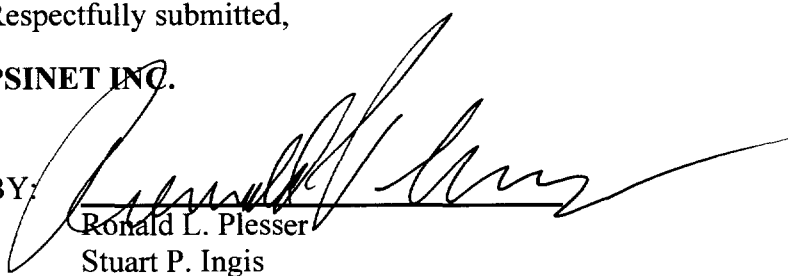
## CONCLUSION

For the reasons set forth above, PSINet Inc. supports the request of CIX/ITAA and urges the Commission to issue an order extending for at least 2 years the structural, nondiscrimination and other safeguards contained in Section 272 of the Act.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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